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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

RAD REFERRAL: 09L-05

DATE OF REFERRAL: January 21, 2009

DATE ACTIVATED: March 23, 2009

EXPIRATION OF SOL: February 12, 2013
(earliest), continuing

SOURCE:

RAD REFERRAL

RESPONDENTS:

Wynn for Congress and
Curt Clifton, in his official capacity as treasurer

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 441a(a)(1)
2 U.S.C. § 441a(a)(2)
2 U.S.C. § 441a(f)
11 C.F.R. § 102.9(e)
11 C.F.R. § 110.1(b)
11 C.F.R. § 110.1(k)(3)
11 C.F.R. § 110.2(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports
RAD Referral Materials

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Reports Analysis Division ("RAD") referred Wynn for Congress and Curt Clifton, in his official capacity as treasurer,¹ ("the Committee"), the principal campaign committee of Albert Wynn, to this Office for failing to refund \$115,100 in apparent excessive contributions for the 2008 general election. After serving eight terms in the U.S. House of Representatives, Representative Albert Wynn lost the Democratic primary for Maryland's Fourth Congressional

¹ Gregory M. Holloway resigned as treasurer of the Committee on June 18, 2008. Following his resignation, the Committee filed an amended Statement of Organization on October 15, 2008, naming Curt Clifton as treasurer.

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District on February 12, 2008. The Committee accepted general election contributions from individuals and multicandidate committees that had already contributed the maximum amount allowable for the 2008 primary election, which became excessive as of the date Wynn lost the primary. In response to the pre-reason to believe notification letter, the Committee concedes that it used general election contributions to pay for primary election related expenses.²

As described below, we recommend that the Commission find reason to believe that Wynn for Congress, and Curt Clifton, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting \$115,100 in excessive contributions, and 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i) by failing to return or refund the excessive contributions,

II. FACTUAL SUMMARY

On May 20, 2008, RAD sent the Committee a Request for Additional Information ("RFAI") referencing the Committee's 2008 April Quarterly Report, filed with the Commission on April 15, 2008, following Wynn's loss in the primary election. The RFAI notified the Committee that the contributions it accepted for the general election before the primary election had to be either refunded, or redesignated to the primary election if there were net debts outstanding, since Wynn was not participating in the general election.

Representatives of the Committee communicated with the RAD analyst multiple times from June through October 2008 regarding the redesignation of general election contributions,

² The RAD referral also identified \$3,884.28 in apparent excessive primary contributions that were made and accepted after the date of the primary, and exceeded the Committee's net debts outstanding. In the Committee's response to the pre-reason to believe notification letter, it provided documentation that the primary contributions in question were either made before the primary election, and were therefore not post primary contributions subject to the net debt outstanding rule, or were post-primary contributions that were permissible because the Committee had \$83,993.35 net debt outstanding following the primary. The Committee did not report the net debt outstanding to the Commission on its 2008 April Quarterly Report or any subsequent Reports or amendments because it used general election contributions to pay the primary debts. Accordingly, this Report will not address the \$3,884.28 in primary contributions identified in the referral.

1 and making appropriate changes to the 2008 April Quarterly Report, among other things. The
2 Committee explained that it was having problems obtaining relevant records following the
3 resignation of its treasurer, and that the Committee would ultimately like to terminate.

4 On October 31, 2008, the Committee submitted a written response to the RFAI that stated
5 the Committee had used general election contributions to pay for primary election costs because
6 it did not segregate its general election contributions from its primary election contributions.
7 Therefore, the response stated, the Committee could not return the general election contributions
8 because they were no longer available, but that it would use its best efforts to raise funds
9 necessary to reimburse the general election contributors.

10 The Committee filed its Amended 2008 April Quarterly Report on November 3, 2008,
11 disclosing \$115,100 in general election contributions from twenty-two individuals and twenty-
12 four political action committees. All of the general election contributors had already contributed
13 the maximum amount allowable for the primary election. See Wynn for Congress FEC
14 Disclosure Reports.

15 The Committee has not taken any corrective actions to remedy general election
16 contributions. On November 21, 2008, the RAD analyst told a representative of the Committee
17 that the Committee may be referred for additional action by the Commission. On its Amended
18 Termination Report, covering the period of April 1 through June 30, 2008; Amended 2008
19 October Quarterly Report; 2008 30 Day Post-General Report; 2008 Year End Report; 2009 April
20 Quarterly Report and 2009 July Quarterly Report; the Committee disclosed less than \$5,000 in
21 cash on hand and did not disclose any returns or refunds of the general election contributions in
22 question.

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1 The Committee's response to the pre-reason to believe notification letter acknowledges
2 that it used general election contributions to pay for primary election related expenses, and that it
3 does not have funds available to refund general election contributions. It states that since Wynn
4 had never faced a serious primary challenger in past elections, the Committee's treasurer at the
5 time was unfamiliar with the Commission's regulations regarding the use of general election
6 funds for primary election expenses.

7 **III. LEGAL ANALYSIS**

8 The Committee accepted \$115,100 in contributions from individuals and multicandidate
9 political action committees ("PACs") that were designated for the 2008 general election. Under
10 the Federal Election Campaign Act of 1971, as amended ("the Act"), an individual may not
11 make a contribution to a candidate in excess of the limits at 2 U.S.C. § 441a(a)(1)(A) and
12 11 C.F.R. § 110.1(b)(1), set at \$2,300 per election during the 2008 election cycle, and
13 multicandidate political action committees may not make contributions in excess of \$5,000 per
14 election. See 2 U.S.C. § 441a(a)(2)(A). Candidates and political committees are prohibited from
15 knowingly accepting contributions in excess of the limitations in section 441a. See 2 U.S.C.
16 § 441a(f). A primary election, general election, runoff election, and special election are all
17 considered an "election" under the Act, see 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2, and
18 contribution limits are applied separately with respect to each election. See 11 C.F.R. § 110.1(j).
19 "If a candidate fails to qualify for the general election, any contributions designated for the
20 general election that have been received from contributors who have already reached their
21 contribution limit for the primary election would exceed FECA's contribution limits." AO 2007-
22 03 (Obama) at 3.

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1 The Commission's regulations permit a committee to accept contributions for the general
2 election, prior to the primary election, if the committee employs an acceptable accounting
3 method to distinguish between primary and general election contributions. 11 C.F.R.
4 § 102.9(e)(1). An authorized committee's records must demonstrate that prior to the primary
5 election, the committee's recorded cash on hand was at all times equal to or in excess of the sum
6 of general election contributions received less the sum of general election disbursements made.
7 11 C.F.R. § 102.9(e)(2). If, however, the candidate loses the primary election and does not
8 otherwise run in the general election, the committee must, within 60 days: (1) refund the
9 contributions designated for the general election; (2) redesignate such contributions in
10 accordance with 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in
11 accordance with 11 C.F.R. § 110.1(k)(3). See 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i),
12 110.2(b)(3)(i).

13 Because a committee does not have actual notice of the need to obtain redesignations
14 until the results of the primary are known, if a candidate loses the primary election but has
15 accepted a contribution designated for the general election before the primary, the committee has
16 60 days from the date of the primary election to refund, redesignate, or reattribute such
17 contribution. See AO 1992-15 (Russo for Congress Committee) at 2; see also *The Campaign*
18 *Guide for Congressional Candidate and Committees* (April 2008) at 18. After a primary loss,
19 contributors no longer have a separate contribution limit for the general election. AO 2003-18
20 (Smith) at 3, AO 1986-17 (Green) at 4. Redesignation of general election contributions may
21 only occur to the extent that the amount redesignated does not exceed the contributor's
22 contribution limit for the primary and the amounts redesignated do not exceed the net debts
23 outstanding from the primary. See 11 C.F.R. §§ 110.1(b)(5)(iii) and (b)(3)(i), 110.2(b)(5)(iii)

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1 and (b)(3)(i); *see also* AO 1992-15 at 2. A committee's net debts outstanding are calculated, in
2 relevant part, based on the total amount of debts and obligations incurred for an election, less the
3 total cash on hand available to pay the debts and obligations, and any amounts owed to the
4 committee. 11 C.F.R. § 110.1(b)(3)(ii). If a committee deposits contributions that exceed its net
5 debts outstanding, it must, within 60 days of accepting the excessive contributions, refund,
6 redesignate, or reattribute the excessive contributions. 11 C.F.R. §§ 110.1(b)(3)(i),
7 110.2(b)(3)(i), *see also* 11 C.F.R. §§ 110.1(b)(5) and 110.1(k)(3). Likewise, reattribution of a
8 general election contribution may only occur to the extent that such attribution does not exceed
9 the contributor's contribution limits. *See* 11 C.F.R. § 110.1(k)(3)(ii)(B)(1); *see also* AO 2007-03
10 (Obama) at 3.

11 In this case, the Committee accepted general election contributions totaling \$115,100
12 (\$41,600 from twenty-two individuals, and \$73,500 from twenty-four PACs), but failed to
13 return, refund, reattribute or redesignate the contributions within 60 days of the February 12,
14 2008, primary loss. *See* 11 C.F.R. § 102.9(e)(3). The Committee could not redesignate the
15 general election contributions to the 2008 primary election because all of the general election
16 contributors had already contributed the maximum amount allowable for the primary election.
17 Moreover, reattribution of the Committee's general election contributions would not remedy the
18 Committee's acceptance of a contribution designated for an election in which Wynn was not
19 participating. *See* 11 C.F.R. § 110.1(k)(3). Therefore, the Committee's only option was to
20 return or refund the general election contributions, which it has not done. Although the
21 Committee informed RAD that it was incapable of returning the contributions, it represented that
22 it would use best efforts to raise funds necessary to reimburse the general election contributions.
23 In its response to the pre-reason to believe notification letter, the Committee indicates that it is

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1 unable to raise any additional funds without discussing any efforts it may have made. *See*
2 11 C.F.R. § 102.9(e)(1). The Committee has consistently reported less than \$5,000 cash on hand
3 in its reports following the primary, far less than the \$115,100 necessary to refund the general
4 election contributions. AO 2007-03 (Obama) at 3.

5 Based on the foregoing, we recommend the Commission find reason to believe that
6 Wynn for Congress and Curt Clifton, in his official capacity as treasurer, violated 2 U.S.C.
7 § 441a(f) by knowingly accepting \$115,100 in general election contributions from individuals
8 and multicandidate committees that had already contributed the maximum amount allowable for
9 the 2008 primary election, which became excessive as of the date the candidate lost the primary;
10 and 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i) by failing to return or refund the
11 excessive contributions.

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V. RECOMMENDATIONS

1. Open a Matter Under Review with respect to RR 09L-05;
2. Find reason to believe that Wynn for Congress and Curt Clifton, in his official capacity as treasurer, violated 2 U.S.C. § 441a(f), 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), and 110.2(b)(3)(i);
- 3.
- 4.
5. Approve the attached Factual and Legal Analysis; and
6. Approve the appropriate letter.

Thomasenia P. Duncan
General Counsel

10/13/09
Date

BY:


Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

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